

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 14-14B (SKANSKA USA)**

and

Case No. 2-CB-63648

BIAGIO NICCHIA, An Individual

*Rhonda Gottlieb and Alejandro Ortiz, Esqs.,
New York, NY, for the General Counsel.*

*James M. Steinberg, Esq., Tarrytown, NY,
for the Respondent.*

*Seth Ptasiwicz, Esq., White Plains, NY,
for the Charging Party.*

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge filed by Biagio Nicchia, An Individual, on August 30, 2011, a complaint was issued on November 15, 2011 against the International Union of Operating Engineers, Local 14-14B (Respondent or Union).

The complaint alleges essentially that the Respondent attempted to cause and caused Employer Skanska USA to discharge Nicchia from employment, and that the Respondent did so because Nicchia was not a member of the Union and for reasons other than the failure to tender uniformly required initiation fees and periodic dues. The complaint alleges that the Respondent has violated Section 8(b)(2) of the Act by attempting to cause and causing an employer to discriminate against its employees in violation of Section 8(a)(3) of the Act, and has also restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

The Respondent's answer denied the material allegations of the complaint, and on January 30, 2012, a hearing was held before me in New York, NY. Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the Acting General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Employer, a New York corporation having an office and place of business at 16-16 Whitestone Expressway, Whitestone, NY, has been engaged in construction, commercial development, and civil infrastructure, planning, design, and construction. Annually, the Employer, in conducting its business operations, has provided from its New York office services valued in excess of \$50,000 directly to entities which are located outside New York State. The Respondent admits, and I find that the Employer has at all material times been an employer

engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits that it has been a labor organization within the meaning of Section 2(5) of the Act.

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II. The Facts

The Employer, as a member of the General Contractors Association of New York, and the Union are parties to a collective-bargaining agreement. The agreement does not contain an exclusive hiring hall arrangement.

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Biagio Nicchia worked for the Employer, on and off, for about 15 years, and was a member of the Union throughout his employment. He was referred by the Union through its hiring hall whereby he appeared at the hall in the morning, signed a list and waited for the Union delegate to refer him to a job. At the job site, he met with a "contact, usually another member of the Union," who gave him paperwork to complete. When Nicchia was referred in this manner, he never met with an Employer representative prior to beginning work.

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In 2004, Nicchia entered a plea of guilty to a charge of labor racketeering, specifically to conspiracy to extort the Union by placing the Union "in fear of economic harm in order to ensure individuals were given preferential jobs." Nicchia was incarcerated for about 15 months. After his release from prison in April, 2005, he continued to be referred to work for the Employer and other employers through the Union's hiring hall for jobs covered by its contract.

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On July 25, 2008, a Consent Decree was entered into by the U.S. Attorney for the Eastern District of New York and the Union to "eradicate corruption and any organized crime influence within the Union while preserving the Local's strength and autonomy as the bargaining agent and representative of its membership." As relevant here, the Decree provides for the appointment of an Ethical Practices Attorney to investigate corruption and bring disciplinary proceedings against Union members who have engaged in corruption concerning the Union. The Decree also provides for the appointment of a Hearing Officer to conduct disciplinary proceedings against Union members and to remove from Union membership any member who the Hearing Officer has determined engaged in corruption concerning the Union.

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In July, 2010, Nicchia was referred for work to the Employer by Christopher Confrey, the Union's Business Representative and Recording/ Correspondence Secretary. At the jobsite, Nicchia was given paperwork by a member of the Union. He was assigned to work for the Employer operating locomotive transporting personnel in and out of the tunnel on a project involved with the construction of the Second Avenue Manhattan subway line. Nicchia stated that he did not meet with any Employer representative before beginning work for the Employer at that time.

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Confrey testified similarly that when an employee is referred by the Union to work, the worker is met at the job by a Union member Master Mechanic if one is employed on the job, or if not, by another member of the Union who provides the paperwork for the employee to complete. Confrey stated that the referrals he makes are accepted by the Employer.

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On April 29, 2011, the Ethical Practices Attorney filed a Disciplinary Proceeding against Nicchia based on the criminal conduct to which he pled guilty in 2004.

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On August 1, 2011, after considering the evidence, the Hearing Officer, based on the conduct Nicchia pled guilty to in 2004, found that Nicchia engaged in corruption within the meaning of the Consent Decree. The remedy sought was Nicchia's permanent expulsion from

membership in the Union.¹

On the same day, August 1, Union attorney James Steinberg sent an e-mail to the Union's Business Manager, Office Manager, and Confrey advising:

Mr. Nicchia has been permanently expelled from the union by decision of the hearing officer.

Business Agents, if Mr. Nicchia is working in your jurisdiction... you are to contact him immediately and advise him that: (1) you have been advised by the hearing officer that he has been permanently expelled effective immediately from Local 14-14B and (2) accordingly you will be replacing him on the job starting tomorrow.

Union official Confrey stated that when he received the e-mail from Steinberg, he called Nicchia and told him that he had been expelled from the Union and that he would have to replace him on the work project. Confrey and Nicchia had a good relationship at that time, and Confrey conveyed to Nicchia that he regretted informing Nicchia of his replacement. According to Confrey, Nicchia replied that he "understood" and did not object to being replaced. Nicchia testified that he told Confrey that he would pursue whatever options were available. At that time, Nicchia had been a dues-paying member of the Union.

Confrey replaced Nicchia by calling Master Mechanic John Hassler, and advising him that, at a proceeding before a hearing officer, Nicchia had been found guilty of corruption and had been expelled from the Union, and that "due to his expulsion I was advised by counsel to replace him immediately."

Later that day, Confrey reviewed the Union's referral list and told Hassler that Nicchia's replacement would be Matt Palladino. Confrey signed the referral slip listing Palladino as the new hire as of August 2, and Palladino began work that day.

Confrey testified that he never told anyone at the Employer that Nicchia had been expelled from the Union, and never instructed anyone from the Employer to terminate Nicchia because of his expulsion. Nor did he inform the Employer that Nicchia was being replaced on the project. Confrey also stated that no one from the Employer asked him why Nicchia was replaced, and he did not expect to hear from the Employer regarding the replacement because the "day to day operations are left to the internal working of the local and the Union, and as long as the apparatus and machinery are up and running they don't inquire as to who was doing what."

Analysis and Discussion

I. The Alleged Violation of Section 8(b)(2) of the Act

Section 8(b)(2) of the Act makes it an unfair labor practice for a union to:

¹ In June, 2011, Nicchia attempted to resign from the Union. In his decision, the Hearing Officer rejected Nicchia's attempted resignation on the ground that it did not encompass the full relief sought by the Ethical Practices Attorney – Nicchia's permanent expulsion from the Union.

cause or attempt to cause an employer to discriminate against an employee in violation of Section (a)(3) of the Act or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Nicchia's membership in the Union was terminated by the Hearing Officer who found that Nicchia had engaged in corruption concerning the Union in violation of the Consent Decree. Thereafter, immediately upon receiving the Hearing Officer's decision expelling Nicchia from the Union, Union attorney Steinberg instructed Union official Confrey that inasmuch as Nicchia had been expelled from the Union they should advise him that he would be replaced on his job. Confrey relayed that reason for Nicchia's replacement to Nicchia and to Master Mechanic Hassler.

I reject the Respondent's argument that the Hearing Officer's decision was the intervening event which necessarily caused Nicchia's replacement at work. The Hearing Officer's decision did not refer to Nicchia's employment, and mandated only that he be expelled from the Union. Rather, the Respondent clearly communicated to its officials that Nicchia must be replaced on his job because his Union membership was terminated. Accordingly, the "actual motivation" for Nicchia's loss of his job was that he was expelled from Union membership. *Graphic Communications Local 1-M (Bang Printing)*, 337 NLRB 662, 674 (2002).

The Supreme Court held in *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954), that "the policy of the Act is to insulate employees' jobs from their organizational rights.... 8(b)(2) [was] designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."

The Board has stated that "whenever a labor organization 'causes the discharge of an employee, there is a rebuttable presumption that [the labor organization] acted unlawfully because by such conduct [it] demonstrates its power to affect the employees' livelihood in so dramatic a way as to encourage union membership among the employees.'" *Acklin Stamping Co.*, 351 NLRB 1263, 1263 (2007), citing *Graphic Communications Workers Local 1-M (Bang Printing)*, 337 NLRB 662, 673 (2002).

However, as the Board further explained in *Graphic Communications*, at 673, a union may lawfully cause an employee's discharge "in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency."

Accordingly, the Union may rebut the presumption of illegality in the discharge of Nicchia by showing that its action was "necessary to the effective performance of its function of representing its constituency." See also *Local 18, Operating Engineers*, 204 NLRB 681, 681 (1973).

Therefore, a determination must be made as to whether the Union's reason for causing the discharge of Nicchia was sufficient to rebut the presumption that the discharge violated the Act. In seeking to rebut the presumption, the Union relies heavily on *Philadelphia Typographical Union No. 2 (Triangle Publications)*, 189 NLRB 829 (1971).

In that case, the union's sole reason for requesting an employer to discharge employee Kelley was because of his embezzlement of union funds. The Board, in finding no violation by the union in requesting the discharge, found that Kelley's conduct was "sufficiently offensive to

foreclose any reasonable inference that respondent in causing his impaired employment status was guilty of action falling within the class of conduct that inherently encourage membership.” 189 NLRB at 830.

5 However, *Philadelphia Typographical* is easily distinguishable from the instant case. In that case, the Board found that the union’s expulsion of Kelley from membership played no role in its request that he be discharged. In addition, after finding Kelley guilty of embezzlement of union funds, the union requested his discharge, and again requested that he be discharged after he was expelled from union membership.

10 Here, in contrast, the sole reason for the Union’s replacement of Nicchia was his expulsion from the Union and not his conviction or the Hearing Officer’s decision expelling him from membership. Thus, despite the fact that Nicchia pled guilty in 2004 to acts constituting corruption involving the Union, the Union continued to refer him to jobs, even after he was incarcerated. Indeed, he was referred to work with the Employer and with other employers on a
15 regular basis for seven years, from 2004 to August, 2011, following his conviction. During that period of time, the Union did not take any action to replace him at work. Rather, he was replaced at work only when he was expelled from the Union.

20 It is therefore quite clear that Nicchia’s criminal conviction seven years earlier, which the Union was aware of for all that time, played no part in the Union’s decision to replace him at work until August, 2011. Rather, the sole reason for Nicchia’s replacement at work was his expulsion from the Union. Attorney Steinberg’s e-mail to the Union’s officials makes this crystal clear. He notified them that Nicchia was expelled from the Union by the Hearing Officer and they
25 should immediately advise him that “accordingly you will be replacing him on the job starting tomorrow.”

30 In arguing that the “intervening event” in the replacement of Nicchia grew out of the Hearing Officer’s decision to permanently expel him from the Union, the Respondent asserts that, in replacing Nicchia, it adhered to the spirit of the Consent Decree which sought to ensure that the Union remained free of corruption and that its membership adhered to the highest standards of integrity. The Respondent argues that it replaced Nicchia because it sought to “rid
itself of corruption and maintain job site integrity for its membership.”

35 Those may be laudable goals and certainly *Philadelphia Typographical* supports such a reason for causing the discharge of a union member. However, that was not the true reason that Nicchia was replaced. As set forth above, the true motivation for Nicchia’s discharge was that he had just been expelled from the Union.

40 The Respondent makes several other arguments. First, it asserts that it did not violate Section 8(b)(2) of the Act which requires that the Union cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act, because the Union did not cause the Employer to replace Nicchia. Here, it is clear that the Respondent delegated its authority to hire and replace employees to the Union which is a typical arrangement in hiring
45 hall situations. *Grason Electric Co.*, 296 NLRB 872, 887 (1989); See *Miranda Fuel Co., Inc.*, 140 NLRB 181, 188 (1962). Nicchia never met a representative of the Employer when he reported for work pursuant to a referral from the Union, and the Union used its own members at the jobsite to process newly hired workers who it had referred. Further, as testified by Confrey, the Employer left the hiring and replacement decisions to the Union as long as the jobsite was operating properly.

50 Accordingly, the Union stepped into the shoes of the Employer in deciding to replace Nicchia and it is liable for its action in doing so. The Employer was not involved in that action

because the Union chose not to involve it, simply because the decision was made by the Union. The Union did not have to cause the Employer to replace Nicchia because it took such action itself.

5 Indeed, as the Supreme Court stated:

10 [T]he Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. Local 357, *Teamsters v. N.L.R.B.*, 365 U.S. 675, 676 (1961).

15 The Respondent further argues that, according to Confrey's testimony, since Nicchia acquiesced in the Union's decision to replace him, he waived any right that he may have had to remain on the job. However, according to Nicchia, he told Confrey that he would pursue whatever options were available.

20 It is not necessary to resolve this issue. Even assuming that I credit Confrey's testimony, there was little Nicchia could have done at the time to have the Union reverse its decision to replace him. Confrey told him that he had been expelled from the Union and he was being replaced. The fact that Nicchia may have said that he "understood" and may have even stated that he did not object to being replaced, does not mean that he waived any legal right to contest his being replaced. Nicchia thus could not have expected to request reinstatement from the Union which had just replaced him on the job and it is clear that any further complaint would have been fruitless. *Miami Valley Carpenters' District Council*, 129 NLRB 517, 523 (1960).

II. The Alleged Violation of Section 8(b)(1)(A) of the Act

30 The complaint also alleges that the Respondent, by its actions in causing the Employer to replace Nicchia violated Section 8(b)(1)(A) of the Act. That Section states, as relevant herein, that it shall be an unfair labor practice for a Union to restrain or coerce employees in the exercise of the rights guaranteed in section 7 of the Act.

35 The Board routinely finds a derivative violation of Section 8)(b)(1)(A) where a Section 8(b)(2) violation has been proven. The reason is that the union's causation of an employee's discharge necessarily constitutes restraint and coercion of the worker's exercise of his Section 7 rights. *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004); *Postal Workers*, 350 NLRB 219, 222 (2007).

40 The General Counsel's brief alleges that the Respondent independently violated its duty of fair representation toward Nicchia by causing his replacement. I agree. The discharge of Nicchia because he was not a member of the Union was an independent violation of Section 8(b)(1)(A) in that the Respondent has violated its duty of fair representation toward him. *Letter Carriers Branch 3126 (Postal Service)*, 330 NLRB 587, 587 (2000).

45 By causing the discharge of Nicchia because of his non-membership in the Union, the Respondent encouraged membership therein by demonstrating that maintenance of a job is conditioned on continued membership in the Union.

50 Conclusions of Law

1. The Respondent, International Union of Operating Engineers, Local 14-14B, is a labor

organization within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Employer Skanska USA, is an employer within the meaning of Section 2(2),(6) and (7) of the Act.

3. By attempting to cause and causing the Employer to discharge Biagio Nicchia from his employment because he was not a member of the union and for reasons other than the failure to tender uniformly required initiation fees and periodic dues, and by causing the Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act, the Respondent violated Section 8(b)(2) and Section 8(b)(1)(A) of the Act.

4. By causing the discharge of an employee because he was not a member of the Union, the Respondent has violated its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I have found that the Respondent has been delegated by the Employer the responsibility for the hire and replacement of employees, I find that the Respondent must offer to reinstate Biagio Nicchia.

The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The Respondent, in its brief, argues that Nicchia's backpay should be limited to three weeks inasmuch as the locomotive work that Nicchia was performing was discontinued about three weeks after his replacement. Nevertheless, there was testimony that the Second Avenue Subway construction job was ongoing and that the Respondent continues to refer workers to that project for work with the Employer to which Nicchia could possibly be referred. I will leave this issue to the Compliance part of this proceeding.

The Respondent shall also be required to remove from its files any and all references to the replacement of Biagio Nicchia and to notify him in writing that this has been done and that such adverse actions will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, International Union of Operating Engineers, Local 14-14B, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Attempting to cause and causing Employer Skanska USA or any other employer to discharge Biagio Nicchia from his employment because he was not a member of the Union and for reasons other than the failure to tender uniformly required initiation fees and periodic dues, and by causing the Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Biagio Nicchia full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Biagio Nicchia whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days of this Order, remove from its files, and ask the Employer to remove from the Employer's files, any reference to the unlawful replacement of Biagio Nicchia, and within 3 days thereafter notify Nicchia in writing that this has been done and that his discharge will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, notify the Employer, Skanska USA, that it has no objection to the employment of Biagio Nicchia, and furnish Nicchia with copies of such notification.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its union office in Whitestone, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.m March 20, 2012.

Steven Davis
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

**Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities**

WE WILL NOT attempt to cause and cause the Employer Skanska USA or any other employer to discharge Biagio Nicchia or any other employee from his or her employment because he or she was not a member of the Union and for reasons other than the failure to tender uniformly required initiation fees and periodic dues, and by causing the Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Biagio Nicchia full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL within 14 days from the date of the Board's Order, notify the Employer, Skanska USA, that we have no objection to the employment of Biagio Nicchia, and WE WILL furnish Nicchia with copies of such notification.

WE WILL make Biagio Nicchia whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL, within 14 days from the date of this Order, remove from our files, and ask the Employer to remove from the Employer's files, any reference to the unlawful replacement of Biagio Nicchia and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the discharge against him in any way.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL
14-14b

(Union)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.